

Supreme Court decision brings end to long running farm purchase dispute

Background

In 2010, Phillip and Julia Routhan (**Routhans**) purchased a dairy farm on the West Coast for \$2.8 million.

The Routhans purchased the farm based on representations made by PGG Wrightson Real Estate Limited (**PGG**) that the farm's recent milk production was steady at 103,000 kg of milk solids (kgMS).

The Routhans were unable to achieve the expected production levels and, instead, production fluctuated between 60,597 kgMS and 88,503 kgMS.

The Routhans attempted to increase production levels through investment in capital improvements, however this was unsuccessful and it was later revealed the production levels had been declining for several years before the sale.

Compounded by decreasing milk prices and financial pressure from their bank, the Routhans were ultimately forced to sell the farm at a significant loss.

High Court

The Routhans successfully brought a claim in the High Court against PGG for misleading and deceptive conduct under section 9 of the Fair Trading Act 1986 and in negligence.

The High Court found that PGG had incorrectly represented that there had been no change in the production figures, had neglected to verify key farm information and had failed to inform the Routhans that the vendor had refused to verify the production figures.

Additionally, the High Court found the negligence was a material cause of the Routhan's financial losses that arose from their inability to achieve the represented production levels. PGG claimed that the Routhans' own negligence was responsible for the

losses. However, this was rejected by the High Court.

The Routhans were awarded \$1,442,000 for the loss of sale of the farm and run-off property and \$680,000 for capital investments not reflected in the loss of sale damages.

However, the final award was reduced by 20% to reflect the Routhan's contributory negligence in making certain capital investments that were not directly connected to improving milk production or productivity. The total award made by the High Court was \$1,697,000.

A more detailed review of the High Court decision can be found [here](#).

Court of Appeal

The Court of Appeal upheld the High Court's finding that PGG had negligently misrepresented the production levels. However, it differed in its approach to the calculation of damages.

The Court of Appeal considered that PGG's duty was to provide updated production information. The absence of updated production information, or incorrect production information, created a risk that the Routhans would overpay for the farm.

The Court of Appeal did not consider PGG to have assumed responsibility to advise the Routhans on any particular course of action they should take following their purchase of the farm. Accordingly, the Court of Appeal held the post-purchase losses were beyond the scope of PGG's duty/were not caused by PGG's misrepresentation.

Following the principles established in the South Australia Asset Management Corp v York Montague Ltd, the Court of Appeal confined the scope of PGG's duty to the consequences of the incorrect production information.

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As such, the appropriate measure of damages was the difference between the price paid for the farm and its true market value at the time, had the production levels been correctly represented. The Court of Appeal awarded damages of \$300,000.

A more detailed review of the Court of Appeal decision can be located [here](#).

Supreme Court

The High Court and Court of Appeal decisions established that PGG was liable to the Routhans as a result of PGG's misrepresentation. The remaining issue for the Supreme Court to determine was therefore the quantum of damages and the basis for awarding such damages.

The majority, comprising of Glazebrook, Kos and Miller JJ, held that PGG's duty of care extended to both the risk that:

- (a) the Routhans would overpay for the farm; and
- (b) the production that the Routhans would achieve would be lower than the levels represented to them.

The majority made it clear PGG was not liable because it passed on incorrect information. Rather, PGG was liable for carelessly leading the Routhans to believe production levels had been verified by the vendor when PGG knew this had not occurred.

Conversely, in dissent, Winkelmann CJ and Ellen France J supported the position reached by the Court of Appeal that PGG's duty of care was confined to the risk that the Routhans would overpay for the farm.

It is important to note that the Supreme Court was unanimous in its view that PGG could not be liable for all post-purchase losses.

The majority found PGG was only liable for:

- \$480,500 (being the amount the Routhans overpaid for the farm);
- \$150,000 (being the cost of additional money spent on fertiliser to achieve expected production levels); and
- \$150,000 (being the cost of re-pasturing the farm to improve production).

Arguments that the Routhans were partly to blame for their losses were rejected because they invested based on PGG's information.

However, the majority found that other losses, such as revenue shortfalls, increased debt servicing costs, supplementary feed and long-term capital investments were either not caused by, or clearly attributable to, PGG's breach, were not reasonably foreseeable, or were already accounted for in the awarded damages.

The Supreme Court ordered PGG to pay the Routhans \$780,500 in damages, along with interest and \$50,000 in costs.

Key Takeaways

From a purchaser's perspective, the case highlights the importance of conducting robust due diligence. Farm transactions are inherently complex and a thorough due diligence process needs to be undertaken to allow a purchaser to identify, verify, understand and assess key information and risks.

We always recommend that purchasers seek the advice of their lawyer before entering into an agreement to purchase a farm. While farm transactions utilise the Law Association's standard Agreement for Sale and Purchase of Real Estate as a base, the reality is that farm transactions involve multiple asset classes (land, machinery, buildings and often stock, employees and dairy company shares). This means that appropriate further terms are required to address such assets, with a robust due diligence clause being included in order to allow

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the farm, and the assets that it comprises, to be inspected and understood.

While due diligence is crucial, this case also highlights its limits. In some situations, there may be information that only the vendor can verify. Where this occurs, it is often appropriate for a purchaser to require a vendor to stand behind such information (often in the form of warranties that the vendor would provide). If a particular risk is not already priced in and cannot be mitigated to a level that a purchaser considers to be satisfactory, a purchaser may request that the vendor indemnifies it against all loss that arises from that risk. These mechanics are often the subject of negotiation but, if agreed, allow a purchaser to pursue recovery against a vendor for a breach of contract (rather than an alternative claim).

There is inherent uncertainty in asking a Court to determine a claim that relates to loss arising from a farm purchase and it is advisable that purchasers seek to mitigate this risk through robust due diligence and appropriate contractual mechanics. The Supreme Court's decision clearly highlights that not all forms of loss are recoverable under a claim of this nature and the loss that was deemed to be recoverable in this situation was only decided to be recoverable by a narrow 3-2 margin (after earlier litigation which no doubt would have brought with it considerable expense for both sides).

We are also noticing a growing trend of "own judgment" clauses being included in agreements for sale and purchase of farms. These clauses effectively provide that the purchaser has entered into the agreement in reliance of its own judgment and not in reliance of any statement or representation made by the vendor or its agent. Purchasers should ensure that they understand the effect of clauses of this nature and should carefully consider whether this is something that they are prepared to accept.

From a vendor's perspective, the case emphasises the importance of verifying all statements or representations that are being made. The marketing material for farms (particularly large farms) is often extensive and a

vendor (or an agent) may wish to maintain a "verification register" that records the underlying information/basis for a particular representation or statement. We also suggest that vendors engage their lawyer at an early stage to review/stress test marketing material and to review/prepare the agreement for sale and purchase. Some vendors may also wish to instruct their lawyer to complete vendor due diligence on the farm in order to ascertain whether there are any risks that a purchaser may identify.

Particular care needs to be taken with critical information that goes to value, such as milk production volumes for a dairy farm.

Want to know more?

If you have any questions about the contents of this article or rural transactions, please contact [David Goodman](#), [Reuben Adams-Cook](#) or our specialist [Rural and agribusiness team](#).